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# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**OCTOBER TERM, 1957**

**Docket No. 24561**

In the Matter of the Petition for Review of the Application of

CHA'O LI CHI,
also known as Cha'o Pieh Chi,
*Petitioner-Appellant,*

v.

JOHN L. MURFF, District Director of Immigration and Naturalization for the District of New York,
*Respondent-Appellee.*

## BRIEF AND APPENDIX OF RESPONDENT-APPELLEE

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UNITED STATES COURT OF APPEALS
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*Respondent-Appellee.*

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## BRIEF AND APPENDIX OF RESPONDENT-APPELLEE

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### Statement

Petitioner appeals from an order of the District Court for the Southern District of New York per Honorable John F. X. McGohey, District Judge, whereby summary judgment was granted dismissing appellant's petition for judicial review of prior administrative proceedings held by the Immigration and Naturalization Service.

This petition for review had been brought in the District Court following an adverse ruling by the Immigration and Naturalization Service on appellant's application for ad-

justment of his immigration status under Section 6 of the Refugee Relief Act of 1953, as amended. The order and judgment appealed from was filed on November 7, 1956. Notice of appeal was filed on November 14, 1956. On August 16, 1957, by order of this Court pursuant to a stipulation between the attorneys for the parties, the title of the action was amended to reflect that John L. Murff had become District Director of the Immigration and Naturalization Service for this district in place of Edward J. Shaughnessy and that he was, therefore, substituted as respondent-appellee.

## The Facts

Appellant is a thirty-year-old unmarried male, a native and citizen of China, whose only entry into the United States occurred at the port of New York on February 3, 1939. He was admitted under the pertinent sections of the Immigration Act of 1924 (43 Stat. 153) as a member of the family of a Nationalist Chinese Government official. The father, the Government official upon whose status that of the appellant depended, terminated his official connection with the Nationalist Chinese Government and departed from the United States on December 9, 1946 returning to Communist China. Appellant remained in the United States notwithstanding the return of his family to the mainland of China.

On June 7, 1949, a warrant of arrest was issued, charging appellant with being subject to deportation in that he had remained in the United States after the termination of the exempt status of the member of his family who was a government official of another country. Deportation hearings were held and appellant was ordered deported on December 4, 1952.

After denial of various other forms of administrative relief from deportation, appellant ultimately made application for adjustment of status under Section 6 of the Refugee Relief Act of 1953, as amended (68 Stat. 1044-5; 50 U. S. C. App. 1971d). A hearing was held at which appellant gave extensive testimony. On May 10, 1955, the Special Inquiry Officer recommended that appellant's application for adjustment of status be denied, and this recommendation was approved by the Regional Commissioner. The denial was predicated, in part, upon the ground that on the basis of secret and confidential information, appellant would be inadmissible to the United States were he seeking to be admitted for the first time.*

Appellant thereupon instituted an action for judicial review of this administrative proceeding as well as for review of the denial of other discretionary relief. Initially, United States District Judge Noonan, in an unreported memorandum opinion filed October 4, 1955 (App'l't's App. pp. 2a-9a), denied the Government's motion for summary judgment to dismiss the complaint, and directed a remand to the appropriate hearing officer of the Immigration and Naturalization Service for a hearing consistent with the Court's opinion (App'l't's App. pp. 10a-11a). Judge Noonan had held that, since the application for relief under Section 6 of the Refugee Relief Act was denied on the basis of secret and confidential information tending to show that appellant would be inadmissible to the United States were he applying now for such admission, appellant had been denied due process of law under the rationale of *Chew* v. *Colding*, 344 U. S. 590 (1953), and that he was entitled to know the broad nature of the secret and confidential information being used against him as to

* One of the statutory prerequisites for relief under Section 6 was legal admissibility to the United States.

his "admissibility". Judge Noonan, however, at the same time expressly recognized the propriety of the use of such information in that phase of the proceeding wherein appellant hoped to show that he would be subjected to physical persecution if deported under Section 243(h) of the Immigration and Nationality Act (8 U. S. C. §1253(h)). Judge Noonan's order was filed on December 5, 1955.

Neither side appealed; and consistent with Judge Noonan's opinion, a reopened hearing was held on March 25, 1956, by the Immigration and Naturalization Service. Appellant was represented by counsel, and a resume of the confidential information affecting appellant was introduced into the record of the proceedings. Appellant's attorney gave no indication of being dissatisfied with the sufficiency of the disclosures thus made but proceeded to direct his own examination of the appellant. In this examination he sought to explain away the import of the erstwhile confidential information and also (presumably) to have appellant establish as an affirmative fact that he had reason to fear persecution or that he would be persecuted upon his return to China.

On April 10, 1956, the Special Inquiry Officer recommended that the application for adjustment of status be denied upon the ground that appellant had failed to establish that he had reasonable grounds to fear persecution upon his return to China because of his political opinions. This recommendation was adopted by the Regional Commissioner on May 9, 1956.

Appellant then moved again for injunctive relief and for a judicial review of the administrative determination

(Appellee's App. pp. 1a-3a). Respondent cross-moved for summary judgment (Appellee's App. pp. 4a-7a). Judge McGohey, in a memorandum opinion, denied the petition for review and the motion for an injunction and granted the cross-motion for summary judgment dismissing the complaint (App'l't's App. 12a-15a).

This appeal followed the entry of an order consistent with Judge McGohey's opinion (App'l't's App. p. 16a).

## Statute Involved

Section 6 of the Refugee Relief Act of 1953 (67 Stat. 400) as amended by the Act of August 31, 1954 (68 Stat. 1044-1045); 50 U. S. C. App. 1971d, provides:

> Sec. 6. Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide nonimmigrant and that he is unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion, or who was brought to the United States from other American republics for internment, may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all the facts and circumstances of the case, determine that such alien has been of good moral character for the preceding five years and that the alien was physically present in the United States on the date of enactment of this Act and is otherwise qualified under all other provisions

of the Immigration and Nationality Act except that the quota to which he is chargeable is oversubscribed, the Attorney General shall report to the Congress all the pertinent facts in the case. If, during the session of the Congress in which a case is reported or prior to the end of the session of the Congress next following the session in which a case is reported, the Congress passes a concurrent resolution stating in substance that it approves the granting of the status of an alien lawfully admitted for permanent residence to such alien, the Attorney General is authorized, upon the payment of the required visa fee, which shall be deposited in the Treasury of the United States to the account of miscellaneous receipts, to record the alien's lawful admission for permanent residence as of the date of the passage of such concurrent resolution. If, within the above specified time, the Congress does not pass such a concurrent resolution, or, if either the Senate or the House of Representatives passes a resolution stating in substance that it does not approve the granting of the status of an alien lawfully admitted for permanent residence, the Attorney General shall thereupon deport such alien in the manner provided by law: *Provided*, That the provisions of this section shall not be applicable to any aliens admitted into the United States under the provisions of Public Law 584, Seventy-ninth Congress, second session (60 Stat. 754) Public Law 402, Eightieth Congress, second session (62 Stat. 6): *Provided further*, That the number of aliens who shall be granted the status of aliens lawfully admitted for permanent residence pursuant to this section shall not exceed five thousand.

## Introduction to Argument

The appellant, admittedly deportable as one unlawfully in the United States, sought an adjustment of his status to that of a permanent resident on the ground of possible persecution in China if deported thereto. In challenging the denial of this discretionary relief by the Attorney General, appellant makes two arguments to this Court.

First, he claims that the denial of his application for an adjustment of status is unsupported by the evidence of record and is completely arbitrary.

Secondly, he asserts that *ex parte* confidential information was used at least as a partial basis for the adverse administrative determination, thereby violating his rights under the Constitution and the Administrative Procedure Act.

The Government's reply to these arguments may be summarized as follows:

A. The administrative record on its face clearly justifies the finding that appellant has failed to sustain his burden of affirmatively establishing that he had grounds to fear persecution if deported.

B. Appellant's charge concerning the use of *ex parte* information by the Attorney General avails him nothing: first, because the record fails completely to show that there was any reliance upon such assumed *ex parte* information; and secondly, even were the contrary true, the use of confidential and undisclosed information on an application for purely discretionary relief has been sustained in the Courts.

# ARGUMENT

## POINT I

**Appellant failed to sustain his burden of establishing that he had reasonable grounds to fear persecution if sent to China.**

It will be contended in Point II, *infra*, this brief, that an application for relief under the Refugee Relief Act (such as the one made by this appellant), being one essentially addressed to executive discretion, is not governed by the usual rules concerning hearings on matters of "right", and that the sufficiency of the evidentiary basis for administrative findings cannot properly be subjected to the same type of judicial review which obtains, for example, where an alien is attacking the factual basis of his claimed deportability. In short, it will be contended in Point II that since the appellant's application was one addressed to executive discretion, the legal "sufficiency" of the basis for executive denial of the application is not subject to judicial review.

We shall, for the present, however, proceed on the contrary assumption that the appellant in this case would have been entitled to judicial relief in the court below had he been able to establish that the administrative finding of the Attorney General (to the effect that the appellant had failed to establish any rational basis for an inference of persecution if deported) was a finding repugnant to the evidence of record.

The only issue before the Special Inquiry Officer was whether or not appellant has made out his case*. The determination that appellant had failed to establish his vulnerability to persecution was based upon record evidence from which the Special Inquiry Officer concluded that appellant's claimed fear of persecution was unfounded and unsupported. The issue of fact having been resolved against appellant on evidence of record, the only issue remaining for judicial determination is whether or not there is sufficient evidence in this case to warrant such finding. Unless it could be said by this Court that the findings of the Special Inquiry Officer are so bereft of support in the record as to require judicial intervention, appellant has no standing to compel judicial review.

Where there is jurisdiction, a finding of fact by the Executive Department is conclusive and there is no judicial power to intervene unless there is either a denial of a fair hearing, application of an erroneous rule of law or a finding unsupported by evidence. See *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922).**

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* No matter to what degree appellant claims to have "refuted" the previously undisclosed adverse information, we submit that his refutation did not establish that he would be persecuted, or even that he had reasonable cause to fear same as an objective fact. Appellant offered no affirmative proof. His whole testimony consisted of mere self-serving denials of the inferences which might reasonably be drawn from his admitted past activities and associations. But these denials do not affirmatively establish reasonable grounds for fear of persecution.

** There is no contention that the hearing was unfair or that there was an application of an erroneous rule of law. In connection with the former, neither at the reopened administrative hearing nor before Judge McGohey nor on the pleadings was there any objection that the hearing was rendered unfair because the Government adverted at all to what prior to its disclosure, consistent with Judge Nooman's order, was confidential information. That failure to object, even assuming that a valid objection could lie, really precludes consideration of whether or not error was committed in this respect.

Moreover, where the issue resolves itself into a determination based upon an evaluation of the testimony and the record evidence, the witness' demeanor, and the probative value and the weight to be given to conflicting evidence, it is equally well settled and no longer open to dispute that the conclusion of the administrative officer is invulnerable in the courts unless it can be said that it could not conceivably have been arrived at by a fair minded man and is therefore arbitrary. See *Kumaki Koga* v. *Berkshire*, 75 F. 2d 820 (9th Cir. 1935), *cert. denied* 295 U. S. 757 (1935) *sub nom. Koga* v. *Carr; Flynn ex rel. Yee Suey* v. *Ward*, 104 F. 2d 900 (1st Cir. 1939); *Impastato* v. *O'Rourke*, 211 F. 2d 609 (8th Cir. 1954), *cert. denied* 348 U. S. 827 (1954). Neither the District Court nor this Court will weigh administrative evidence; and judicial review is limited to a determination as to the substantial fairness of the proceedings. The court does not weigh the merit of competing inferences once it is determined that there is a reasonable probability of the facts found by the administrative agency, and the mere fact that the court feels that it would not have made that finding of fact is not sufficient to set aside the administrative finding. See *United States ex rel. Vajtauer* v. *Commissioner*, 273 U. S. 103 (1927), where the Court said at p. 106:

> "Upon a collateral review . . ., it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a Court of the essential unfairness of the trial . . ."

See also *Tisi* v. *Tod*, 264 U. S. 131 (1924).

In the instant case, the Special Inquiry Officer's determination that appellant had not established fear of persecution is a finding which is manifestly not so "devoid of evidence" as to enable appellant to obtain judicial intercession. It should be remembered what appellant was required to establish. He was required to establish that he is unable to return to China because of persecution or fear of persecution on account of his race, religion or political opinion. The mere self-serving statement that one has reason to fear persecution arising out of a natural reluctance to be compelled to leave the United States falls far short of the satisfaction of a burden of proof whether in a judicial proceeding or in an administrative proceeding. Appellant could offer no better evidence in support of the burden than the assertion that he thought he would not be permitted to dance without State supervision and that he would have to do exactly what is assigned to him. He further stated that his is a cultural type of work and that as a cultural worker rather than as a technician, he could work only if he believed in what he was doing. On that basis, he claimed that he would not be willing to work as an entertainer and he could not even be proficient notwithstanding his admission that he could engage in his cultural art in Red China. He further admitted that his mother had written to him to return to China and that his family was not under any duress.

It cannot be too highly emphasized that the appellant did *not* present the case of a man who had, by open and avowed advocacy of anti-communism, rendered himself a marked man in Communist circles. Appellant's proof was bereft of a showing that he had spoken or written anything of a public nature which would have in any sense compromised him.

On the contrary, the Special Inquiry Officer had before him evidence of appellant's pristine respect for the agrarian "reforms" of the Chinese Communists, as well as the fact that his father, notwithstanding his prior employment by the Chinese Nationalist Government, remained, after the capitulation of Peking to the Communist forces, a professor at Peking University. Most important of all, appellant admitted that he had never been overtly anti-communist in this country.

In that posture and in accordance with the overwhelming weight of judicial authority, this Court should not disturb the administrative determination, or substitute its judgment for that of the Special Inquiry Officer. It is not even necessary for us to say, in support of the Special Inquiry Officer's decision, that he disbelieved appellant. Compare *United States ex rel. Watts* v. *Shaughnessy*, 206 F. 2d 616 (2d Cir. 1953). We reiterate that the testimony given by appellant in support of his application, even if given full credence despite its self-serving nature, fell far short of what any reasonable hearing officer would accept as satisfaction of that burden. See *United States ex rel. Dolenz* v. *Shaughnessy*, 200 F. 2d 288 (2d Cir. 1952), *cert. denied* 345 U. S. 928 (1953).

## POINT II

**Appellant's objection to the alleged use of *ex parte*, evidentiary material is without merit, both because (A) the administrative record fails to show any reliance upon any "confidential" data; and (B) because, even had confidential information been used, such use has received prior judicial approval.**

### A

In asserting that, in addition to the alleged "insufficiency" of the basis for the Attorney General's adverse finding, such finding is also infected by the use of confidential data not disclosed to the alien, the appellant is raising a feigned issue, not only unsupported by the record, but an issue that was not even raised in the court below.

Originally, of course, the appellant's application was denied administratively on the purported basis of confidential information. (See order of May 10, 1955, Administrative Record) However, Judge Noonan having, correctly or otherwise,* initially remanded the matter for

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* It will be noted that in his intermediate ruling, Judge Noonan differentiated between the propriety of the use of confidential information by the Government in determining the likelihood of persecution of an alien in the event of his deportation, and the lack of propriety of the use of such confidential information in connection with a "predetermination" of the alien's legal "admissibility", such legal "admissibility" being one of the qualifying factors of eligibility for relief under Section 6 of the Refugee Relief Act. The Government did not appeal from this decision, *inter alia*, because the conditions of Judge Noonan's remand could be complied with without compromising security. Had an appeal been taken, the Government could have contended that the use of secret and confidential information on the issue of admissibility is no less proper than on the issue of persecutability. This argument would have been based upon the pro-

further hearings, at which Judge Noonan directed that the Attorney General should furnish the alien with the "broad nature" of any adverse information in possession of the Service pertaining to the alien, his directive was fully complied with, thereby giving appellant a full opportunity to meet any such adverse information.

Despite his failure, at that second hearing, to have unequivocably demanded to know the source or sources of the adverse information—and despite his further failure to have objected thereto in the pleadings in this case or in the hearing before the District Court—appellant now claims that error was committed by the Attorney General in not furnishing the sources of the information gratuitously.

Even were it proper, at this late date, for appellant to claim prejudicial error by reason of his failure to have been informed of the precise "sources" of the "confidential" information, such claim would be frivolous and utterly without merit in the context of this particular case. This is so because, substantially speaking, the specifications of adverse information given to the alien were conceded to

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visions of the Immigration and Nationality Act providing for the use of secret and confidential information in connection with an application for admission to the United States. See Section 235(c) of the Act (8 U. S. C. 1225(c)). Thus, an alien who seeks to enter the United States could do so only under the procedures prescribed by Congress including those authorizing the use of confidential information. See *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950). On the basis of the foregoing it might then have been argued that the same standard should be permissible with respect to one who seeks adjustment of status and upon whom it is incumbent to show that he would be admissible to the United States were he then abroad seeking admission. But, compare *Chew* v. *Colding*, 344 U. S. 590 (1953).

be essentially correct by the alien himself in his testimony. He merely testified, by way of confession and avoidance, that the assertions made against him in the specifications did not in fact warrant the inference that he was a sympathizer with the Communist cause.

More importantly, the record itself is devoid of any affirmative indication that the hearing officer relied upon any evidence that was not made a part of the record. It is the time honored practice of the Immigration Service and the Attorney General, when circumstances require it to resort to evidentiary material of an *ex parte* nature, to state on the record that that has been done (see e. g. testimony of Thomas G. Finucane, Chairman of the Board of Immigration Appeals at page 127(a) in record on appeal *Accardi* v. *Shaughnessy*. Court of Appeals, Docket No. 23191, October Term, 1954. See also in addition, the original notation of the Hearing Officer in the instant case, wherein the Hearing Officer adverts specifically to the use of confidential information as a basis for his decision.) No such reference is to be found in the latest decision of the Hearing Officer; and it is crystal clear from the record that the Hearing Officer was satisfied (and justifiably so) from the testimony of the appellant himself that the appellant had completely failed to furnish any rational basis for the inference that he might be persecuted because of his political views should he be returned to China.

Actually, the record indicates clearly that the ultimate facts previously derived from confidential sources, but freely disclosed at the final hearing, were used purely for the purpose of assisting the appellant into steering his testimony into the area in which the Government was interested in having him testify in support of his applica-

tion. Such steering was adequately conducted by appellant's counsel, who used the disclosures (and quite properly) as a starting point from which he could conduct appellant's examination. The appellant, having in effect admitted to questionable associations, then proceeded to insist that such associations should not, in his case, be unfavorably construed, since he was now favorably disposed toward democracy and opposed to Communism. He added, as already discussed in this brief, that as a cultural performer he might find it difficult to reconcile his art with that art which might possibly be demanded of him by the Communist regime. Hardly a reason for the granting of the extraordinary discretionary relief sought by the appellant!

## B

It need hardly be restated here that an alien's application for relief from deportation addressed to the discretion of the Executive Branch of the Government is not subject to judicial review or, at best, is subject only to severely circumscribed judicial review. Undoubtedly, in a decision by the administrative agency affecting the alien's *right* to remain in the United States or to be expelled therefrom under an order of deportation, the courts will review the administrative decision in order to determine whether or not the hearing was fair, whether or not correct rules of law were applied or whether or not there is evidence to support the finding of deportability. See Section 242(b) and Section 242(b)(1-4) of the Immigration and Nationality Act (8 U. S. C. §1252(b) and §1252(b)(1-4)); *Kessler* v. *Strecker*, 307 U. S. 22, 34 (1939); *United States ex rel. Vajtauer* v. *Commissioner, supra.* Such considerations do not, however, obtain in

cases where what the alien seeks is not a matter of *right* but is a matter addressed solely to the discretion of the Attorney General and wherein it is sought to be relieved from deportation by way of executive dispensation.

The courts have sharply circumscribed the area of judicial review of the exercise of administrative discretion and have repeatedly held that an alien has no privilege to have the decision reviewed in the courts nor any Constitutional right to demand that it should. The power of the Executive Branch of the Government to suspend or waive or withhold deportation is a dispensing power not unlike a court's power to suspend execution of a sentence. It is a matter of executive grace. More often than not, the granting of the discretionary relief of suspension and/or waiver of deportation is a matter of joint executive and legislative clemency. That the Attorney General has here exercised his discretion unfavorably does not give the rejected applicant a right to judicial review. (See *Jay* v. *Boyd*, 351 U. S. 345 (1956); *United States ex rel. Hintopoulos* v. *Shaughnessy*, 233 F. 2d 705 (2d Cir. 1956), *aff'd* 353 U. S. 72 (1957); *United States ex rel. Weddeke* v. *Watkins*, 166 F. 2d 369 (2d Cir. 1948), *cert. denied* 333 U. S. 876 (1948); *United States ex rel Kaloudis* v. *Shaughnessy*, 180 F. 2d 489 (2d Cir. 1950); *United States ex rel. James* v. *Shaughnessy*, 202 F. 2d 519 (2d Cir 1953), *cert. denied* 345 U. S. 969 (1953).

In this area of executive discretion, it is recognized that whatever an alien applicant for executive bounty receives in the nature of a hearing, that is all he can expect. The Attorney General has virtually unfettered discretion and even if it be assumed that Congress had given an applicant a right to offer evidence, the discretionary power vested in the Attorney General gives no right to the kind of hear-

ing "which contemplates full disclosure of the considerations entering into a decision." *Jay* v. *Boyd, supra; United States ex rel. Matranga* v. *Mackey,* 210 F. 2d 160 (2d Cir. 1954); *United States ex rel. Dolenz* v. *Shaughnessy,* 206 F. 2d 392 (2d Cir. 1953). The Attorney General could, even where an application was entirely regular on its face, reject that application on the basis of confidential information indicating that the applicant was essentially undeserving of the relief available by a favorable exercise of discretion. The right to be confronted and any other rights accorded in ordinary administrative proceedings, either as a necessary incident of the Constitutional guarantees of due process of law or as a necessary incident of the Administrative Procedure Act, simply do not exist. The provisions of the Administrative Procedure Act (5 U. S. C. §§1001 *et seq.*) clearly apply only in cases where formal hearings are required by law with respect to matters of right, and have no application whatever to petitions addressed to executive clemency. An application for adjustment of status under Section 6 of the Refugee Relief Act, as amended [68 Stat. 1044-45, 50 U. S. C. App. §1971d], is essentially one addressed to executive discretion. Indeed, a reading of the statute shows that in at least one respect it is closely parallel to Section 243(h) of the Immigration and Nationality Act [8 U. S. C. §1253(h)]. We refer to the question of possible exposure to physical persecution as a ground for withholding of deportation. In construing the latter statute, this Court has repeatedly held that an application to the Attorney General to withhold deportation upon the ground that the applicant fears physical persecution if deported under Section 243(h) of the Immigration and Nationality Act is discretionary in nature and, therefore, not reviewable. See *United States ex rel. Dolenz* v. *Shaughnessy,* 200 F. 2d 288 (2d Cir. 1952), *cert. denied*

345 U. S. 928 (1953); *United States ex rel. Moon* v. *Shaughnessy*, 218 F. 2d 316 (2d Cir. 1954).

Congress, in enacting Section 243(h) of the Immigration and Nationality Act, made it eminently clear that an application for a stay of deportation upon the grounds of persecution is dependent entirely upon the "opinion" of the Attorney General or his delegate. The statute carefully avoided the use of any language which might imply the requirement of a formal trial and ruling upon admissible evidence.*

In that particular, there is no logical reason why Section 6 of the Refugee Relief Act should be treated any differently. The relief requested by the applicant is not only one addressed to joint executive and legislative discretion, but the determination as to the alien's vulnerability to "persecution" of necessity lies purely within the executive political field; and the courts have accordingly declined steadfastly to intervene in such matters.**

Moreover, and even if we were not here dealing with a discretionary application (and thus one not requiring any

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* It should be noted that the first section ever enacted wherein provision was made for the Attorney General to withhold deportation on grounds of possible persecution was Section 23 of the Internal Security Act, which amended former 8 U. S. C. §156. Prior to its repeal by the present Act, that Section read as follows:

> "No alien shall be deported under any provisions of this act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution."

Under that Statute it was frequently contended that the provision concerning the authority of the Attorney General to "find" that an alien would be persecuted required that a formal hearing of some kind should be had. This Court, of course, held otherwise in the *Dolenz* case, reported at 200 F. 2d 288, *supra*.

** A decision concerning the possible future persecution of an alien in a foreign country is surrounded by elements of prophesy and speculation. Such a decision requires the executive officer to

formal hearing at all), appellant is wholly in error in suggesting that the provisions contained in Section 7 and other Sections of the Administrative Procedure Act relative to the general conduct of administrative proceedings and the mechanics of offering evidence have any bearing whatsoever upon the exercise by the Attorney General and his hearing officers of the executive function in administering immigration matters. The 1952 Immigration Act has a self-contained procedure for proceedings affecting an alien's right to remain in the United States; and obviously (and as frequently held by the courts, e. g., *Marcello* v. *Bonds*, 349 U. S. 302 (1955) at pp. 305-310) the hearing provisions of the Administrative Procedure Act do not govern at all in immigration matters.

Parenthetically, of course, it should be noted that in a deportation proceeding where deportability is in issue, an alien *is* entitled to all the rights of presentation and examination of evidence to which he would be entitled if Section 7 of the Administrative Procedure Act were applicable; and it is only because the context of the present case deals with a matter of *discretion*, and not with a matter of an alien's right (that is, his Constitutional right to a fair hearing on a charge which

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call upon every possible avenue of experience, information and judgment to assist him in making his decision. The Attorney General is in a position to have access to vast security and confidential information from investigative branches of the Government and from foreign sources, obtained through diplomatic channels. The use of such information places the Attorney General in the best position to exercise judgment and to rule upon possible future trends in foreign countries. See *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), at p. 488. Compare the language of the Supreme Court in *C & S Airlines* v. *Waterman Corp.*, 333 U. S. 103 (1948), at p. 111, in connection with a parallel executive power. For a square holding, see the *Dolenz* and *Moon* cases, *supra*, and also *U. S. ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (2d Cir. 1953).

may affect his claim of the right to remain in the United States) that we make the contention that the Attorney General would here have the right to use confidential information. Such contention, of course, is not to be construed as a concession that such confidential information was in fact used. The record demonstrates the contrary.

## CONCLUSION

**The order of the District Court, dismissing the complaint, should be affirmed.**

Respectfully submitted,

PAUL W. WILLIAMS,
*United States Attorney for the Southern District of New York.*
*Attorney for Respondent-Appellee.*

ROY BABITT,
*Special Assistant U. S. Attorney.*

HAROLD J. RABY,
*Assistant U. S. Attorney.*

*Of Counsel.*

September, 1957.

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# APPENDIX

## Notice

(45)

[SAME TITLE]

*Sir*:

PLEASE TAKE NOTICE that upon the annexed Motion for Review of Marvin M. Neuman, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at the Motion Term thereof, at the United States Courthouse, Foley Square, New York, Room No. 506, on the 12th day of June, 1956, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a review of the administrative decision heretofore rendered, and for such other and different relief as to the Court may seem just and proper in the circumstances.

Dated: New York, New York
June 4, 1956.

Yours, etc.

MARVIN M. NEUMAN
Marvin M. Neuman
Attorney for Plaintiff-Petitioner
Office & P. O. Address
1776 Broadway
Borough of Manhattan
City of New York

*Notice*

To:

PAUL C. WILLIAMS, Esq.
United States Attorney
New York City, New York

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**Motion for Review**

(46)

[SAME TITLE]

The petitioner above named, by his attorney, Marvin M. Neuman, Esq., submits the within Motion to Review an Administrative Decision, upon the following bases of facts:

1. This is an action for a declaratory judgment, under the Declaratory Judgment Act (28 U. S. C. 2201), and for review under the Administrative Procedure Act (5 U. S. C. 1001, et seq.), and under the Immigration and Nationality Act (8 U. S. C. 1, et seq.). [Sic].

2. On September 30, 1955, the Hon. Gregory F. Noonan, Judge, United States District Court, Southern District of New York, published the Opinion in this matter, followed by Order, signed on December 2, 1955.

3. Pursuant to said Opinion and Order, the Defendant-Respondent conducted an examination of the Plaintiff-Petitioner, said examination having taken place on March 27, 1956.

(47)

4. On April 10, 1956, the appropriate Hearing Officer of the Defendant-Respondent prepared a recommendation denying the alien's application for adjustment of status.

5. On May 17, 1956, the Regional Commissioner ordered that the application be denied. Attached hereto and made a part hereof is the final administrative order entered in this matter.

6. It is submitted that the final administrative determination is against the evidence and is against the weight of the evidence.

7. It is submitted that the recommendation of denial is based upon a conclusion reached by the Defendant-Respondent, which conclusion is based upon no evidence of record.

8. It is submitted that the alien has established beyond question a reasonable and legitimate fear of persecution, if returned to his native country, and that the conclusion reached by the administrative officers that he has failed to establish reasonable grounds on which to fear persecution is an arbitrary and capricious determination.

WHEREFORE, the Petitioner prays for a judicial review of the aforesaid determination, and for such other relief that to the Court may seem proper.

Respectfully submitted,

MARVIN M. NEUMAN
Marvin M. Neuman
1776 Broadway
New York 19, New York

Dated: New York, New York
June 4, 1956

## Notice of Cross-Motion

(51)

[SAME TITLE]

*Sir:*

PLEASE TAKE NOTICE that upon the annexed affidavit of Roy Babitt sworn to the 17th day of July, 1956, upon the administrative record herein, and upon all prior proceedings herein, the undersigned will cross move this Court at a term for motions thereof, in Room 506, United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 31st day of July, 1956, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment dismissing the complaint herein, on the ground that no genuine issue as to any material fact exists, and that defendant-respondent is entitled to judgment as a matter of law, and for such other, further and different relief as may appear just and proper.

Dated: New York, N. Y., July 17, 1956.

(52)

Yours, etc.

THOMAS B. GILCHRIST
Acting United States Attorney
for the Southern District of
New York
Attorney for Defendant-Respondent
Office & P. O. Address:
United States Courthouse
Foley Square
New York 7, N. Y.

*Notice of Cross-Motion*

To:

MARVIN M. NEUMAN, Esq.
Attorney for Plaintiff-Petitioner
1776 Broadway
New York, N. Y.

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**Affidavit of Roy Babitt**

(53)

[SAME TITLE]

State of New York,
County of New York,
Southern District of New York—ss.:

ROY BABITT, being duly sworn, deposes and says:

1. I am a Special Assistant United States Attorney in the office of the United States Attorney for the Southern District of New York, and am fully familiar with the facts in this case.

2. This affidavit is submitted in opposition to what plaintiff-petitioner calls a motion for review of an administrative decision and in support of defendant-respondent's cross-motion for summary judgment dismissing the complaint herein on the ground that no issue of material fact exists, and that defendant-respondent is entitled to judgment as a matter of law, in that it appears from the record of prior administrative proceedings that

the plaintiff-petitioner herein after fair and legal hearings has been found properly deportable, and further that the denial of relief under Section 6 of the Refugee Relief Act (54) has in all respects been proper.

3. The plaintiff-petitioner herein challenges the validity of a prior administrative determination wherein he was denied relief under Section 6 of the Refugee Relief Act, and therefore, whatever merit exists in the complaint depends upon disclosures made by the administrative record. Therefore, such administrative record is incorporated herein by reference as Exhibit A and is presently available for inspection by plaintiff-petitioner or counsel in the office of the United States Attorney, and will be tendered to the Court as an exhibit on the argument of the instant cross-motion.

4. The petition for review does not address itself to the finding of deportability nor does it in anywise contest any of the other administrative determinations had herein. It addresses itself solely to the decision of the Immigration & Naturalization Service on plaintiff-petitioner's application for relief under Section 6 of the Refugee Relief Act upon the remand to said Service on order of this Court dated December 5, 1955. Thus, the only question raised involves the propriety of the administrative determination that plaintiff-petitioner's application for relief should be denied on the ground that applicant had failed to establish reasonable grounds upon which he could show fear of persecution upon his return to China. The foregoing is a conclusion of law properly determinable in the instant cross-motion.

*Affidavit of Roy Babitt*

WHEREFORE, deponent prays that plaintiff-petitioner's motion for review be denied in all respects (55) and defendant-respondent's cross-motion for summary judgment dismissing the complaint on the ground that no issue of material fact exists and that defendant-respondent is entitled to judgment as a matter of law, should be granted.

/S/ ROY BABITT

(Sworn to July 17, 1956.)